



GMS Flash Alert

Immigration Edition

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United States - Changes to H-1B Visa Program Anticipated

On September 3, 2020, the U.S. Department of Homeland Security (DHS) submitted a proposed rule to the Office of Management and Budget (OMB) aimed at revising the H-1B visa program and eligibility criteria.¹ As the rule now awaits review by OMB, the proposed regulatory changes to the H-1B program are one step closer to publication in the *Federal Register* to be implemented by the DHS.

While the text of the rule is not publicly available, according to prior regulatory announcements from the DHS, the proposed rule is expected to revise the definition of what is considered a “specialty occupation” for H-1B visa purposes as well as redefine the employer-employee relationship criteria. (For prior coverage on the agency’s Spring 2020 regulatory agenda, see [GMS Flash Alert 2020-310](#), July 10, 2020.)

WHY THIS MATTERS

In sum, the proposed H-1B changes are likely to create additional onerous steps for H-1B employers as well as the H-1B visa holders. Both employers and H-1B beneficiaries could be required to submit more comprehensive and detailed documentation in support of an H-1B petition.

More on Anticipated Changes to H-1B Program

The proposed rule, titled “Strengthening the H-1B Nonimmigrant Visa Classification Program,” now awaits review by the OMB and could be published by the end of the year, or earlier. While the text of the rule is not publicly available, it is widely anticipated the proposed rule will formalize previously-announced regulatory objectives from the DHS impacting

the H-1B visa program, such as:

- A revision to the definition of “specialty occupation” in order to increase focus on “obtaining the best and the brightest foreign nationals via the H-1B program.” It is anticipated the proposal seeks to adjust the definition of “specialty occupation” to focus more heavily on the nexus between the position’s educational degree requirements, the job description, and the degree held by the H-1B beneficiary – with the effect of potentially narrowing the types of positions that may ultimately qualify for H-1B visa classification.
- A revision to the definition of the employer-employee relationship is expected to narrow the types of employment arrangements eligible for H-1B visa sponsorship, and possibly limit placement of H-1B workers offsite at third-party locations. The rule may also reinstitute onerous documentary requirements for employers whose H-1B workers perform work at third-party client worksites – requirements the DHS earlier this year agreed to suspend pursuant to a settlement agreement reached between the USCIS and a non-profit organization that represents the interests of IT companies.²
- Establishing new wage and Labor Condition Application (LCA) requirements “designed to ensure employers pay appropriate wages to H-1B visa holders.”

KPMG NOTE

Public Input on Changes and Next Steps for Employers?

The DHS intends to publish the new H-1B regulation as an interim final rule meaning the public, including H-1B employers, would not have the opportunity to provide public comment on the impact of the rule. Further, as an interim final rule, the new regulation could be effective immediately upon publication without a standard 30-day delayed implementation period. However, once the regulation is reviewed by OMB and published in the *Federal Register*, the proposed rule could possibly face court challenge from employers and industries that utilize the H-1B visa program.

With an understanding of the possible changes to the H-1B program, employers and foreign nationals can proactively work with immigration counsel to develop strategies to mitigate its impact, especially if the proposed rule is to take effect immediately. Employers and immigration counsel should be prepared to anticipate that the proposed regulation will narrow the types of positions and employment arrangements that may qualify for H-1B visa classification.

We Will Monitor the Situation and Keep Readers Informed

KPMG Law LLP in Canada will be carefully monitoring any guidance provided by DHS regarding the proposed regulatory changes to the H-1B visa program. We will endeavor to keep readers of *GMS Flash Alert* posted on any important developments as and when they occur.

FOOTNOTES:

1 See the text and status of “Strengthening the H-1B Nonimmigrant Visa Classification Program” by clicking [here](#).

2 See our prior *GMS Flash Alert* 2020-258 (May 29, 2020) “[United States – Settlement Reached between H1-B IT Employers and USCIS.](#)”

Contact us

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